No. 94-8262

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Supreme Court, U.S.
FILED
1995
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**CLARENCE ALLEN LACKEY**

**Petitioner,**

**v.**

**STATE OF TEXAS**

**Respondent.**

**PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS**

*THIS IS A CAPITAL CASE:*
*MR. LACKEY IS CURRENTLY SCHEDULED TO BE EXECUTED ON MARCH 6, 1995, SHORTLY AFTER 12:01 a.m.*

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## QUESTION PRESENTED

Petitioner was indicted for capital murder in mid-1977. As a result of two mandatory appeals in state court, Texas did not obtain a final conviction and schedule Petitioner's execution until *fifteen years later*. Since that point, in mid-1992, Petitioner has expeditiously pursued state and federal habeas corpus proceedings; over that same span, the state courts have issued four death warrants for Petitioner.

Under English common law, the execution of a death sentence under such circumstances would constitute cruel and unusual punishment. *See Riley v. Attorney General of Jamaica*, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman) (arguing that "execution after inordinate delay would [infringe] the prohibition against cruel and unusual punishment [in] Section 10 of the Bill of Rights of 1689...."), *majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica*, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*); *see also Pratt & Morgan*.

Given these circumstances, this petition presents the following question:

**Whether the execution of a death sentence constitutes cruel and unusual punishment under the Eighth Amendment as intended by the Framers if, as a result of inordinate delay not attributable to his own conduct, the condemned is forced to endure nearly two decades on death row, during which time his execution is repeatedly rescheduled.**

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

**CLARENCE ALLEN LACKEY,**

**Petitioner,**

**v.**

**STATE OF TEXAS**

**Respondent.**

Petitioner Clarence Lackey prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals in his case.

**CITATION TO OPINION BELOW**

Copies of the order of both the Texas Court of Criminal Appeals and the state habeas trial court denying habeas corpus relief will be forwarded to this Court as soon as they are issued. They are unavailable as of the time that this petition is being lodged with the Court.

**JURISDICTION**

Mr. Lackey invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The issues raised in this petition implicate the "cruel and unusual punishments" clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States

Constitution. Those provisions read in pertinent part as follows:

**U.S. CONST.**

**Amendment VIII**

"Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*"

**Amendment XIV**

"... [N]or shall any State deprive any person of life, liberty, or property, without due process of law ... "

## *STATEMENT OF THE CASE*

The State of Texas alleged by indictment that Mr. Lackey committed the capital murder of Diane Kumph on or around July 31, 1977. Mr. Lackey was arrested immediately thereafter and charged with capital murder; he has remained in custody during the ensuing eighteen years.

Mr. Lackey was originally tried in the 238th District Court of Midland County, Texas, on a change of venue from Lubbock County in the spring of 1978. At that trial, he was convicted of capital murder and sentenced to death. His case was then pending on an automatic direct appeal[1] to the Texas Court of Criminal Appeals for over four years. On September 15, 1982, that court reversed Petitioner's conviction and sentence on the authority of

[1] The post-Furman Texas capital sentencing statute provides for a mandatory, automatic direct appeal to the Texas Court of Criminal Appeals. See TEX. CODE CRIM. PRO. Art. 37.071(f) (Vernon 1974).



Adams v. Texas, 448 U.S. 38 (1980). Lackey v. State, 638 S.W.2d 439, 471-76 (Tex.Crim.App. 1982).

The case was remanded to the trial court, and Mr. Lackey was retried. He was again convicted of capital murder and sentenced to death in April 1983. Another automatic appeal to the Court of Criminal Appeals ensued. After deliberating over Mr. Lackey's second direct appeal for a total of eight years, the Court of Criminal Appeals -- with four judges dissenting -- ultimately affirmed Mr. Lackey's conviction and sentence both on original submission and on rehearing. See Lackey v. State, 819 S.W.2d 111 (Tex.Crim.App. 1989); id. at 128-41 (Tex.Crim.App. 1991) (on rehearing). Because no petition for certiorari was filed, Mr. Lackey's conviction and sentence became final ninety-days thereafter in August 1991, when the time for filing a certiorari petition passed.[2] Thus, it took the State of Texas from mid-1977 until mid-1991 -- *a period of fourteen years from the time of Mr. Lackey's arrest* -- to secure a final conviction in Mr. Lackey's case.[3] The state trial court subsequently

[2] In Penry v. Lynaugh, 492 U.S. 302 (1989), this Court defined "finality" as being the date of the denial of a direct appeal certiorari petition or, if no certiorari petition is filed, 90 days from the date that final judgment is entered by the state appellate court on direct appeal.

[3] On federal habeas corpus review, the district court was highly critical of the unusually protracted nature of the state court proceedings. See Lackey v. Collins, No. MO-92-CA-181, *memorandum order and opinion*, at 4 n.1 (W.D. Tex. June 11, 1993) (noting that it took 16 years for the case to go from Lackey's arrest to federal habeas corpus review). As discussed infra, such criticism is appropriately directed at the Texas courts -- and not Petitioner -- since fourteen of those sixteen years were

(continued...)

scheduled Mr. Lackey's first execution date to occur on July 17, 1992 -- 15 years from the date of the capital murder.

Only from that point in 1992, when Mr. Lackey filed his first discretionary habeas corpus appeal and sought a stay of execution, can it be said that he was in any way "responsible" for any subsequent delay. From 1992 until January 1995 -- a period of less than three years -- Mr. Lackey litigated his state and federal habeas corpus appeals. See Ex Parte Lackey, Writ No. 24,267-01 (Tex.Crim.App. Dec. 16, 1992), cert. denied Lackey v. Texas, 113 S. Ct. 1319 (1993); Lackey v. Collins, *memorandum opinion and order*, No. MO-92-181 (W.D. Tex. June 11, 1993), aff'd Lackey v. Scott, 28 F.3d 486 (5th Cir. 1994), cert. denied, 115 S. Ct. 743 (Jan. 9, 1995).[4]

While Mr. Lackey litigated his state habeas corpus appeals

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[3](...continued)
spent on criminal proceedings that were non-discretionary in terms of Mr. Lackey's wishes.

[4] The many claims raised on habeas review -- including various challenges to the capital sentencing instructions at trial -- involved quite substantial issues. Indeed, four members of the Texas Court of Criminal Appeals believed that one or more of those claims entitled Mr. Lackey to a new trial. See Lackey v. State, 819 S.W.2d 111, 122-23 (Tex.Crim.App. 1991) (Clinton, J., dissenting); id. at 128 (Miller, J., dissenting); id. at 136-39 (Clinton, J., dissenting from denial of appellant's motion for rehearing, joined by Maloney, J.); id. at 139-41 (Baird, J., dissenting from denial of appellant's motion for rehearing). In addition, the federal district court felt compelled to conduct an evidentiary hearing, see Lackey v. Collins, No. MO-92-CA-181, *memorandum opinion and order*, at 1 (W.D. Tex. June 11, 1993), which is further evidence of the substantial nature of the claims raised on habeas review. See Mann v. Scott, 41 F.3d 968, 985 n. 13 (5th Cir. 1994) ("[T]he holding of an evidentiary hearing is the exception, not the rule. In 1988, for example, only 1.11 percent of all [federal] habeas petitions obtained a full evidentiary hearing.") (citation omitted).



in 1992, the state courts set three separate execution dates -- the first for July 17, 1992; the second for October 17, 1992; and the third for December 17, 1992. See Lackey v. Collins, supra, *memorandum opinion and order*, at 3. The first two dates were stayed by the state trial court. The third execution date was stayed by the federal district court late in the day on December 16, 1992, within hours of the execution scheduled to occur on December 17th at 12:01 a.m. A fourth execution date was scheduled shortly after this Court denied Mr. Lackey's federal habeas certiorari petition on January 9, 1995. That execution date is presently pending.

Both the sheer length of time Clarence Lackey has spent on Texas' death row, nearly two decades, and the repeated execution dates that have been scheduled in this case have caused him a tremendous amount of psychological anguish and pain. The sustained stress and anxiety that Mr. Lackey has been subjected to while on death row -- *to date, waiting nearly as much time to die as he had spent on the earth at the time that he was arrested on capital murder charges in 1977*[5] -- have taken an extreme toll on Mr. Lackey's spiritual well-being and mental health. See *Affidavit of Clarence Lackey* (**Appendix A**); *Affidavit of Josette Tilling* (**Appendix B**). As Mr. Lackey has stated in a recent affidavit:

> 4. The many years that I have spent on death row have been filled with severe stress, depression, and

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[5] Mr. Lackey was 22 years old when he was arrested.

anxiety. The experience of the third execution date was the most traumatic for me. I came within a matter of hours of being executed before that third execution date was stayed by a federal court. After the third date was stayed, I became very ill -- emotionally and physically -- as a result of that traumatic experience.

5. Being on death row so long has been an emotional roller coaster for me. There have been times when I've had great hope that I would win a new trial or have my death sentence commuted. But there have also been countless times when I have believed that the State was actually going to kill me. Preparing for death is a draining experience, both emotionally and spiritually. It should be something that a person has to do only once in a lifetime. I have had to do that many times since being on death row during these many years. I've also had to watch my loved ones experience similar pain.

6. Death row is one of the loneliest, most miserable places on the earth. It is not only miserable because you know the state is planning on killing you, but also because you see the state killing other human beings around you. There have been approximately 90 executions in Texas since I've been here. My inmate identification number is 591. The guys that they're bringing to death row now have their inmate identification numbers in the 1100s. A lot of time has passed, almost two decades, since I've been here. I was a young man when I was arrested. Now I'm approaching my middle aged years.

7. There have been countless times that I have been unable to eat or sleep because of the never-ending stress that I have felt during my lengthy time on death row. Depression and anxiety always follows you around. You never seem to be able to escape it here. I regularly have had nightmares. I have them almost every night when I have had an execution date pending.

**Appendix A, ¶¶ 4-7.**



*REASONS WHY CERTIORARI SHOULD BE GRANTED*

**THE EXECUTION OF A DEATH SENTENCE AFTER KEEPING THE CONDEMNED ON DEATH ROW FOR ALMOST TWO DECADES -- DURING WHICH TIME REPEATED, UNNECESSARY EXECUTION DATES WERE SCHEDULED -- PARTICULARLY WHEN THE DELAY IS LARGELY ATTRIBUTABLE TO THE STATE RATHER THAN THE INMATE -- CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.**

* *"Wasn't the real delay here much before the [habeas corpus appeal]? ... What accounts for that length of time just on ... the direct appeal [which] took so long -- 3 years. ... Well, I must say that that's -- it's hard to expect Federal judges or any judges to get excited about staying a Texas execution when Texas itself diddles arcund for 3 or 4 years ... If you want us to get serious, you should get serious yourselves."*[6]

* *"There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long, extended period of time."*[7]

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[6] Remarks of Justice Scalia to Margaret P. Griffey, assistant attorney general of Texas, during oral arguments in McFarland v. Scott, No. 93-6497 (March 29, 1994), quoted in *Official Transcript [of] Proceedings before the Supreme Court of the United States*, McFarland v. Scott, at pp. 35-37 (Anderson Reporting Co.).

[7] Pratt & Morgan v. Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, slip op., at 16, *reported at* 3 WLR 995, 143 NLJ 1629, 2 AC 1, 4 All ER 769 (British Privy Council Nov. 2, 1993) (*en banc*) (available on LEXIS). A copy of the slip opinion in Pratt & Morgan is attached hereto as **Appendix C.**

* *"[T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689...."*[8]

**A. Introduction**

The execution of a prisoner pursuant to a constitutionally-obtained judgment is not cruel and unusual punishment *per se* under the Eighth and Fourteenth Amendments to the United States Constitution. See, e.g., Jurek v. Texas, 428 U.S. 262 (1976). However, it has long been recognized that while the death penalty itself may not be a cruel and unusual punishment, *the manner of its imposition* may violate the Eighth Amendment depending on the circumstances.

Because of the unusual circumstances surrounding the State's attempt to implement capital punishment in this case, the State of Texas has forfeited its right to execute Clarence Lackey under the Eighth and Fourteenth Amendments. This forfeiture has resulted both from the inordinate amount of time that Mr. Lackey has spent on Texas' death row and the States' *unnecessary* setting of repeated execution dates in this case.[9] Largely the result of

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[8] Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769 (Privy Council 1993) (*en banc*).

[9] The first three execution dates scheduled in this case were set by the Texas trial court solely in order to force Mr. Lackey to initiate his habeas corpus appeals in state and federal court. It is widely understood by members of the bench and bar in Texas -- although not understood by death row inmates facing such execution dates -- that in the overwhelming majority of (continued...)



unnecessary delays by the Texas courts in hearing Mr. Lackey's two mandatory, automatic direct appeals, Mr. Lackey has been required to spend almost two decades on death row. Had Mr. Lackey been sentenced to "life" imprisonment at trial -- which was the only alternative to the death penalty upon a conviction of capital murder -- he would have been eligible for parole in mid-1987.[10]

As explained above, Mr. Lackey's death sentence was originally imposed in 1978 following his 1977 arrest. The Texas Court of Criminal Appeals took over four years to render a

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[9](...continued)
Texas capital cases, such premature execution dates will not result in an actual execution. Judge Edith Jones of the U.S. Court of Appeals for the Fifth Circuit has noted this largely peculiar Texas practice of setting premature execution dates solely to force the immediate filing of habeas corpus appeals by death row inmates. See Hon. Edith Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850, 851 (1990) (referring to the practice as "[d]ocket control by execution date"); see also Mark Ballard, *Death Penalty System Ridiculed*, TEXAS LAWYER, May 11, 1992, at 4 (quoting Fifth Circuit Judge Thomas Reavley's criticism of Texas' system of "jump-starting" habeas corpus appeals by setting premature execution dates).

Petitioner does not dispute that the state has a legitimate interest in seeing that habeas corpus appeals are pursued efficiently by death row inmates; however, considerably less cruel methods are available to assure that habeas corpus appeals are pursued by death row inmates in an efficient manner than Texas' preferred method of setting execution dates. For instance, Texas could enact a reasonable statute of limitations requiring habeas appeals to be filed within a specified period of time. Trial courts could also informally set filing deadlines, which could be enforced with the threat of setting an execution date in the event that such appeals were not timely filed.

[10] See TEX. CODE CRIM. PRO. Art. 42.12, § 15(b) (Vernon's ed. 1979) (capital murder defendant sentenced to "life" eligible for parole after 20 flat calendar years from time that he is taken into custody).

decision on Mr. Lackey's first automatic, mandatory direct appeal. Mr. Lackey's death sentence was re-imposed after a re-trial in early 1983. It then took another eight years for the Texas Court of Criminal Appeals to finally resolve Mr. Lackey's second mandatory direct appeal in 1991. Mr. Lackey's conviction thus became final *14 years* after he was indicted for capital murder. Mr. Lackey exhausted his first round of state and federal habeas corpus appeals in less than three years. ***Thus, only a fraction of the total time that Mr. Lackey has spent on death row is attributable to the delay occasioned by the filing discretionary appeals that he has initiated.***

In this regard, Mr. Lackey's case should be contrasted with other long-time residents of death row, whose delay between trial and execution of a death sentence is largely a function of the inmates' decisions to pursue discretionary appeals. See, e.g., Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1990) (rejecting superficially similar claim of a 16-year resident of Arizona's death row, whose discretionary habeas corpus appeals were responsible for the vast majority of the time he had spent on death row).

### B. The "Death Row Phenomenon" as Unconstitutional Torture

The torturous effects of the "death row phenomenon" -- that is, the psychologically devastating effects of a lengthy stay on death row -- have been widely noted by jurists during the last three decades. See, e.g., Coleman v. Balkcom, 451 U.S. 949, 952



(1981) (Stevens, J., concurring in the denial of certiorari) (recognizing that the mental pain suffered by a condemned prisoner awaiting execution "is [a] significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [*i.e.*, the actual execution]"); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); People v. Anderson, 493 P.2d 880, 6 Cal.3d 628, 649 (Cal. 1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to the execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the [protracted] process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Suffolk County District Attorney v. Watson, 411 N.E.2d 1274, 1289-95 & nn. (Mass. 1980) (Liacos, J., concurring) (vivid and detailed description of the type of psychological pain and torture that a condemned person

experiences while awaiting execution); id. at 1287 (Braucher, J., concurring) (arguing that capital punishment is unconstitutional under Massachusetts Constitution in part because "it will be carried out only after agonizing months and years of uncertainty"); Commonwealth v. O'Neal, 339 N.E.2d 676, 680-81 (Mass. 1975) (Tauro, C.J., concurring) ("The convicted felon suffers extreme anguish in anticipation of the extinction of his existence."); State v. Richmond, 886 P.2d 1329, 1994 WL 699008, at *3 (Ariz. Dec. 15, 1994); Hopkinson v. State, 632 P.2d 79, 209-11 (Wyo. 1981) (Rose, C.J., dissenting in part) (recognizing "the dehumanizing effects of long imprisonment pending execution"); State v. Ross, 646 A.2d 1318, 1379 (Conn. 1994) (Berdon, J., dissenting) (same); Soering v. United Kingdom, 11 Eur. Hum. Rts. Rep. 439 (1989) (European Court of Human Rights refused to extradite a German national from UK to Virginia to face capital murder charges because of anticipated time that he would have to spend on death row if sentenced to death); Vatheeswaran v. State of Tamil Nadu, 2 S.C.R. 348, 353 (India 1983) (criticizing the "dehumanizing character of the delay" in carrying out an execution); Sher Singh et al. v. The State of Punjab, 2 S.C.R. 582 (India 1983) ("Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney General, No. S.C. 73/93 (Zimb. June 24, 1993) (reported in 14 HUM. RTS. L. J. 323 (1993)).



Similar views have been expressed by legal commentators and mental health experts. See, e.g., Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L. FORUM 180 (1994) [available on WESTLAW]; Lambrix, *The Isolation of Death Row* in FACING THE DEATH PENALTY 198 (M. Radelet ed. 1989); Millemann, *Capital Post-Conviction Prisoners' Right to Counsel*, 48 MD. L. REV. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing. ... This opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.") (citing authorities); Mello, *Facing Death Alone*, 37 AMER. L. REV. 513, 552 & n.251 (1988) (same) (citing studies); Wood, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 37-39 (1986) ("The physical and psychological pressure besetting capital inmates has been widely noted .... Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eight amendment violation in itself or is an element making the death penalty cruel and unusual punishment.") (citing authorities); Stafer, *Symposium On Death Penalty Issues: Volunteering for Execution*, 74 J. CRIM. L. 860, 861 & n.10 (1983) (citing studies); Holland, *Death Row Conditions: Progression Towards Constitutional Protections*, 19 AKRON L. REV. 293 (1985); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOLOGY REVIEW 141, 157-60 (1979); Hussain & Tozman, *Psychiatry on Death Row*, 39 J. CLINICAL PSYCHIATRY 183 (1979); West, *Psychiatric Reflections on the Death Penalty*, 45

AMER. J. ORTHOPSYCHIATRY 689, 694-95 (1975); Gallemore & Parton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AMER. J. PSYCHIATRY 167 (1972); Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death By Execution*, 119 AMER. J. PSYCHIATRY 393 (1962); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 830 (1972); G. Gottlieb, *Testing The Death Penalty*, 34 S. CAL. L. REV. 268, 272 & n.15 (1961); A. Camus, *Reflections on the Guillotine* in RESISTANCE, REBELLION & DEATH 205 (1966) ("As a general rule, a man is undone waiting for capital punishment well before he dies."); F. Dostoyevsky, THE IDIOT 47-48 (D. Magarshack trans. 1955); Duffy & Hirshberg, EIGHTY-EIGHT MEN AND TWO WOMEN 254 (1962) ("One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad.") (quoting former warden of California's San Quentin Prison).

Of the approximately 3,000 persons on death row in this country, only a handful of inmates have spent as long a time on death row as Clarence Lackey. Cf. State v. Richmond, 886 P.2d 1329, 1994 WL 699008, at *1-*2 (Ariz. Dec. 15, 1994). What is especially remarkable about Mr. Lackey's case is that the bulk of his many years on death row was not attributable to Mr. Lackey's filing discretionary appeals. Rather, those fourteen years involved two trials (an original trial and a re-trial) and two automatic, mandatory direct appeals -- proceedings not initiated



by Mr. Lackey. The remainder of the time -- less than three years -- has been spent expeditiously pursuing legitimate state and federal habeas corpus appeals raising many substantial issues. Such a delay, according to Chief Justice Rehnquist, makes "a mockery of our criminal justice system," which "undermine[s] the integrity of the entire criminal justice system." Coleman v. Balkcom, 451 U.S. 949, 958-59 (1981) (Rehnquist, J., dissenting from denial of certiorari).

### C. The British Privy Council's Landmark Decision in *Pratt & Morgan*

In addition to the above-cited authorities, Mr. Lackey's Eighth Amendment arguments are strongly supported by a recent landmark decision in a capital appeal rendered by the Judicial Committee of the Privy Council of the United Kingdom (the "Privy Council"),[11] which involved a factual situation quite similar to Mr. Lackey's case. See Pratt & Morgan v. The Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, 3 WLR 995, 143 NLJ 1639, 2 AC 1, 4 All ER 769 (Nov. 2, 1993) (en banc) (available on LEXIS).

In Pratt, an appeal by two condemned men on Jamaica's death row, the Privy Council, sitting *en banc* for the first time in five decades, unanimously held that carrying out the death sentences of the two men would be "torture," and "inhuman" and

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[11] The Privy Council is the highest appellate court for Commonwealth nations. The jurists who sit on the Privy Council are likewise members of England's highest domestic appellate court, the House of Lords ("the Law Lords").

"degrading" punishment. The Privy Council did not hold that capital punishment was cruel and unusual *per se*, but instead focused on the fact that the condemned men had been on death row for a protracted period of time (fourteen years) and, furthermore, that the men had been read execution warrants on three separate occasions, only to have their scheduled executions stayed shortly before the sentences were to be carried out.

The rationale of the case was summarized in the opening paragraph:

> The appellants ... were arrested 16 years ago for murder ... On 15th January 1979 they were convicted of murder and sentenced to death. ... On three occasions the death warrant has been read to [Pratt and Morgan] and they have been removed to the condemned cells immediately adjacent to the gallows. ... *The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows.*

Slip op., at 1 (emphasis added). As the Privy Council further stated:

> There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Id. at 16.

The Privy Council's primary focus was on the sheer length of time that Pratt and Morgan were kept on death row, although a significant secondary theme in the court's reasoning was that the



re-set was itself inhumane and cruel. The court quoted Winston Churchill on this point:

> Mr. Winston Churchill expressed the sentiment of the House when he said "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever the crime. That is a wrong thing."

Id. at 3.

Pratt & Morgan also surveyed the history of English common law regarding the subject of lengthy imprisonment of a condemned man on death row and the repeated setting of execution dates in a single case. The Privy Council concluded that neither practice was condoned historically at common law. See, e.g., id. at 2-3 ("It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting an execution."); id. at 5 (noting the "common law practice that execution followed as swiftly as practical after sentence"); see also Riley v. Attorney General of Jamaica, 1 AC 719, 3 All ER 469 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman) ("[T]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689...."), majority opinion overruled by Pratt & Morgan v. Attorney General of Jamaica, 2 AC 1, 4 All ER 769, 3 WLR 557 (Privy Council 1993) (*en banc*).[12]

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[12] As Justice Scalia has recognized, "[t]here is no doubt" that Section 10 of the English Bill of Rights of 1689 "is the (continued...)

Pratt & Morgan, along with U.S. and international authorities discussed herein, offers a firm legal basis for Mr. Lackey's Eighth Amendment claim challenging the State's right to execute the death sentence in this case.[13]

### D. Eighth Amendment Authority Supporting Mr. Lackey's Claim

Recent Eighth Amendment decisions have, as a threshold matter, focused on whether a challenged punishment was considered unacceptable at the time of the adoption of our Bill of Rights. See, e.g., Stanford v. Kentucky, 109 S. Ct. 2969, 2974 (1989) (in rejecting claim that the execution of 16 and 17 year olds is cruel and unusual, Court noted that the punishment was not "'one of those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted'") (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). If a punishment was considered cruel and unusual in 1789, then this Court's Eighth Amendment analysis goes no further; if the Framers considered a punishment cruel and unusual

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[12](...continued)
antecedent" of the cruel-and-unusual-punishments clause of our Eighth Amendment. See Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (opinion of Scalia, J.).

[13] Literally hundreds of American courts and jurists have been guided by the decisions of the Privy Council, the highest expositor of law in our Mother Country, whose common law has greatly shaped our own law. See, e.g., United States v. Raddatz, 447 U.S. 667, 679 (1980) (citing a Privy Council decision with approval); Kilbourn v. Thompson, 103 U.S. 168, 186 (1881) (same); see also Fisher v. United States, 328 U.S. 463, 486-88 (1946) (Frankfurter, J., dissenting) '"This Court in reviewing a conviction for murder ... ought not be behind ... the Privy Council ....") (discussing Privy Council decisions).



in 1789, then *a fortiori* it is cruel and unusual today. See Ford, 477 U.S. at 405-06.

As discussed above, the Privy Council's review of English common law makes it clear that a nearly two-decade stay on death row would *never* have been tolerated at common law *under any circumstances*. Although elaborate appeals in capital cases (leading to frequent re-trials) are a relatively recent phenomenon -- largely a function of this Court's post-Furman Eighth Amendment capital jurisprudence -- the necessary delay occasioned by such appeals cannot constitutionally extend to the point where the State keeps a man on death row for well over a decade because of mandatory appeals, as in this case.[14] That is, even factoring in the incidental delay caused by modern appeals, a state cannot justify taking over a decade to obtain a final conviction and death sentence on direct review. See Pratt & Morgan, slip op. at 20 ("In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that an execution follows as swiftly as practicable after sentence....").

The Texas courts took fourteen years to obtain a constitutional final conviction and sentence in Mr. Lackey's case. Such an inordinate delay -- which would never have been

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[14] Relying on other international law cases, the Privy Council in Pratt held that even if an inordinate delay between trial and execution is attributable to *discretionary* appeals filed by the condemned person, the government nevertheless has no right to carry out an execution if the delay resulted from legitimate, non-frivolous appeals. See, e.g., Pratt & Morgan, slip op., at 18-20 (discussing cases).

permitted at common law -- is by itself a sufficient reason to prohibit the State of Texas from carrying out Mr. Lackey's scheduled execution. The Eighth Amendment requires no more.

Assuming that a particular type of punishment was permitted at the time that the Bill of Rights was adopted -- or, in this case, assuming that the post-Furman requirement of meaningful appellate review in capital cases somehow alters the common law requirement described above -- a second, more difficult question arises: whether a punishment that may have been acceptable to the Framers of the Constitution nonetheless now violates modern society's civilized standards. See, e.g., Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994) (*en banc*) (hanging not a cruel and unusual punishment).

Addressing the second prong of this Court's Eighth Amendment analysis, this Court has interpreted the reach of the Amendment in a "flexible and dynamic manner." Gregg v. Georgia, 428 U.S. 153, 171 (1976); see also Weems v. United States, 217 U.S. 349, 373 (1910) ("a principle, to be vital, must be capable of wider application than the mischief which gave it birth"). Rather, The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). As the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual. Such factors include the practices among the majority of the states in this country and international practices. See, e.g., Stanford v. Kentucky, 492



U.S. 361, 369 (1989); Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982).

The latter is obviously particularly relevant for purposes of the claim presented herein. As discussed above, the weight of international authority -- including a recent unanimous decision by the highest court in our Mother Country -- strongly supports Mr. Lackey's contention that his execution would violate the Eighth Amendment.

Other well-established Eighth Amendment principles of broad application are relevant to this Court's analysis. The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity and decency'" against which forms of punishment must be measured. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted). It "expresses the revulsion of civilized man against barbarous acts -- the 'cry of horror' against man's inhumanity to his fellow man." Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

The Eighth Amendment's restrictions on the ability of a state to impose certain types of punishment "aim ... to protect the condemned from [unnecessary] fear and pain ... or to protect the dignity of society itself from the barbarity of exacting mindless vengeance." Ford v. Wainwright, 477 U.S. 399, 410 (1986). At its core, the Eighth Amendment stands to safeguard "nothing less than the dignity of man." Trop v. Dulles, 356 U.S. 86, 100 (1958). It cannot be gainsaid that keeping a condemned man on death row -- a place that Mr. Lackey has appropriately

described as "one of the loneliest, most miserable places on earth"[15] -- for nearly two decades impugns fundamental human dignity when there is no legitimate state interest justifying the inordinate delay.

In the particular context of capital punishment -- where the infliction of some incidental pain is obviously unavoidable -- this Court's Eighth Amendment analysis of what is "cruel and unusual" turns on whether unnecessary or gratuitous pain is part of the punishment. As the Court stated in State ex. rel. Francis v. Resweber, 329 U.S. 459 (1947):

> The traditional humanity of modern Anglo-American law forbids the infliction of *unnecessary pain* in the execution of the death sentence. Prohibition against the wanton infliction of pain has come to our law from the [English] Bill of Rights [of 1689]. ... Mr. Francis' suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment.... [The Constitution does not protect against] the *necessary suffering* involved in any method employed to extinguish life humanely. The fact that an *unforeseen accident* prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict *unnecessary pain* nor any *unnecessary pain* involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.

Id. at 463-64 (emphasis added).

As a result of the abhorrent conditions to which he has been subjected during the last eighteen years, Clarence Lackey

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[15] See **Appendix A, ¶6.**



has endured a needlessly *lingering* form of torturous psychological punishment that, if the State has its way, will culminate in a lethal injection following the recent issuance of Mr. Lackey's fourth execution warrant. See Gregg v. Georgia, 428 U.S. 153, 170-71 (1976) (unnecessarily lingering form of execution is unconstitutional under the Eighth Amendment) (citing In re Kemmler, 136 U.S. 436, 447 (1890)).

Finally, the fact that Petitioner is challenging the lingering *psychological* anguish resulting from his excessively lengthy stay on death row and repeated execution dates -- and is not alleging *physical* torture -- does not foreclose an Eighth Amendment claim.[16] It is well-established that the infliction of extreme mental anguish can be a form of unconstitutional torture. See, e.g., Trop v. Dulles, 356 U.S. at 102 (expatriation as penalty for desertion "subjects the individual to a fate of ever-increasing fear and distress"); Hudson v. McMillan, 112 U.S. 995, 1004 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); Furman v. Georgia, 408 U.S. 238, 271-73 (1972) (Brennan, J.,

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[16] In Pratt & Morgan, the British Privy Council focused exclusively on the *mental* torture inflicted on two condemned men on Jamaica's death row. See Pratt and Morgan, slip op., at 1-2 (describing "the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing ... the *emotional and psychological impact of this experience*, for it only reveals that which is to be expected.").

concurring) ("[T]he Framers also knew []that there could be exercises of cruelty other than those which inflicted bodily pain or mutilation."); see also Smith v. Aldingers, 999 F.3d 109, 110 n.4 (5th Cir. 1993) (collecting recent cases holding that mental or psychological torture can violate the Eighth Amendment); cf. In re Medley, 134 U.S. 160, 172 (1890) (recognizing the "immense mental anxiety" that a condemned man experiences when the authorities intentionally refuse to inform him of the precise date of his scheduled execution, and referring to it as "one of the most *horrible feelings* to which he can be subjected") (emphasis added).

Admittedly, In re Medley was an *ex post facto* case. However, its century-old recognition of the "immense" and "horrible" *mental* anguish that a condemned man feels when he does not know the date of his execution -- which this Court recognized as a form of "punishment" implicating the *ex post facto* clause -- is instructive here. Petitioner does not allege that particular type of mental anxiety caused by his confinement on Texas' death row; however, he does contend that the conditions on death row that he has faced have been equally or more "immense" and "horrible." Therefore, to permit the State to carry out an execution after requiring Clarence Lackey to endure such conditions for nearly two decades would unquestionably violate the Eighth Amendment.



**E. Inordinate Delay in the Disposition of a Capital Appeal Is Contrary to the Intent of the Legislature**

Finally, Petitioner calls this Court's attention to the Texas statute governing the imposition of capital punishment in existence from 1974-91, which expressly provided for an extremely *prompt* automatic direct appeal. See TEX. CODE CRIM. PRO. 37.071(f) (Vernon's ed. 1974) (automatic direct appeal requiring "review within 60 days of certification of record," with a possibility of a 30-day extension upon the showing of "good cause," and providing for priority over non-capital appeals). This statutory provision, which was enacted at the very same time that the Texas Legislature enacted the original post-Furman capital sentencing statute in 1973, evinces a clear legislative judgment that promptness is necessary in automatic capital appeals. Of course, the provision has been ignored by the Texas Court of Criminal Appeals in hundreds of cases, including Mr. Lackey's case.

Although not necessarily dispositive of Mr. Lackey's claim, but cf. Ford v. Wainwright, 477 U.S. 399, 428-29 (1986) (O'Connor, J., concurring), this statutory provision further should inform this Court's analysis of what the Eighth Amendment requires based on a legislative judgment made contemporaneously with the resurrection of capital punishment in Texas after Furman.

**F. This Claim is Appropriately Raised at this Juncture**

Although Petitioner recognizes that "this Court rarely

grants review at this stage of the [post-conviction] litigation even when the application for state habeas relief is supported by arguably meritorious constitutional claims,"[17] this Court's primary rationale for not doing so is the Court's belief that "federal habeas proceedings [are] the more appropriate avenues [in the first instance] for consideration of federal constitutional claims."[18] In this case, Petitioner has already exhausted one round of federal habeas corpus appeals and -- barring unforeseen circumstances -- does not intend to file a successive federal petition raising this claim.[19]

There is no need to require Petitioner to file a successive

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[17] Kyles v. Whitley, 498 U.S. 931, 932, 111 S. Ct. 333 (1991) (Stevens, J., concurring in denial of stay and certiorari).

[18] Id.

[19] Petitioner believes that such a successive federal petition would not be barred under the federal abuse-of-the-writ doctrine because Petitioner's claim asserts that he is now constitutionally *ineligible* for capital punishment and, thus, permitting his execution would constitute a fundamental "miscarriage of justice." See Sawyer v. Whitley, 112 S. Ct. 2514, 2519-23 (1992); cf. Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989) (interpreting the first exception of Teague v. Lane, 489 U.S. 288 (1989), as encompassing claims asserting that an inmate is *ineligible* for capital punishment; when "the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying [the Teague doctrine] have little force here") (citing Ford v. Wainwright, 477 U.S. 399 (1986)).

A similar claim was raised on federal habeas review in the Court of Appeals; however, it was rejected both on the ground that it was not raised in the federal district court and also (mistakenly) on the ground that it was barred under the Teague retroactivity doctrine. See Lackey v. Scott, 28 F.3d 486, 492 (5th Cir. 1994). Notably, the federal district court denied relief well before the Privy Council's decision in Pratt & Morgan, which was rendered in November 1993.



federal habeas appeal as a prerequisite for review by this Court because Petitioner herein asserts a claim which may be addressed just as appropriately by this Court in the present procedural posture as by a lower federal court. No additional factual development is required. The only issues raised are questions of law. Moreover, under the law of the case doctrine the federal district court and Fifth Circuit would presumably be bound by the Fifth Circuit's mistaken holding on Petitioner's federal habeas appeal that this type of claim is barred under the Teague doctrine.[20] Thus, resort to the lower federal courts would be futile.

Moreover, such a grant of certiorari would hardly be unprecedented in this procedural posture. Indeed, in State ex rel. Francis v. Resweber, 329 U.S. 459 (1947), this Court granted certiorari to a review a state post-conviction habeas corpus appeal. See also Perry v. Louisiana, 494 U.S. 1015 (1990), later proceeding, 498 U.S. 38 (1991) (granting cert. to review state post-conviction appeal).

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[20] Mr. Lackey's requested relief is not barred under this Court's non-retroactivity doctrine, see Teague v. Lane, 489 U.S. 288 (1989), because this is not a species of constitutional claim that could be subject to a Teague retroactivity analysis. Rather, this is a claim that was not fully ripe for consideration until 1992 -- *after* Petitioner's conviction was final. It was not a claim that could have been anticipated at the onset of Mr. Lackey's second direct appeal (*i.e.*, when the brief was filed), since it does not concern anything that happened at trial. Thus, Teague has no application to this type of claim. Finally, assuming *arguendo* that Teague applied to this type of claim, the claim would fall squarely under Teague's first exception because the claim alleges that Mr. Lackey is *ineligible* for capital punishment. See Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989).

## CONCLUSION

Although this Eighth Amendment claim may be somewhat novel in the U.S. courts, it is firmly rooted in both this Court's Eighth Amendment jurisprudence and English common law going back three centuries. In order to address the many important Eighth Amendment issues raised by this petition, this Court should grant certiorari and stay Petitioner's imminent execution.

Respectfully submitted,

Robert C. Owen by agreed permission
B. C. Newton

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* Counsel of Record
Member, Supreme Court Bar

STATE OF TEXAS )
)
COUNTY OF WALKER)

**AFFIDAVIT OF CLARENCE ALLEN LACKEY**

Comes now Clarence Allen Lackey and states the following:

1. My name is Clarence Allen Lackey. I am a death row inmate who is incarcerated at the Ellis One Unit of the Texas Department of Criminal Justice, Institutional Division, in Hunstville, Texas. I am over the age of 21 and am otherwise competent to make this affidavit.

2. I was arrested on capital murder charges in 1977. I was first tried (and convicted and sentenced to death) in 1978. I was told by the trial judge and my attorney that Texas law provided for a mandatory, automatic direct appeal, which was taken to the Texas Court of Criminal Appeals. That court reversed my conviction and sentence in 1982. I then was re-tried in 1983 and again convicted of capital murder and sentenced to death. Once again, I had a mandatory, automatic direct appeal. In 1989, the Texas Court of Criminal Appeals denied my direct appeal and, two years later, in 1991 denied a motion for rehearing. Thereafter, new attorneys took over my case and state and federal habeas appeals were filed.

3. So far four different death warrants (setting my execution dates) have been issued in my case. The first date was in July of 1992. The second date was in October of 1992. The third date was in December of 1992. Each of those execution dates was stayed by the state or federal courts. My fourth execution date is now pending.

4. The many years that I have spent on death row have been filled with severe stress, depression, and anxiety. The experience of the third execution date was the most traumatic for me. I came within a matter of hours of being executed before that third execution date was stayed by a federal court. After the third date was stayed, I became very ill -- emotionally and physically -- as a result of that traumatic experience.

5. Being on death row so long has been an emotional



roller coaster for me. There have been times when I have had great hope that I would win a new trial or have my death sentence commuted. But there have also been countless times when I have believed that the State was actually going to kill me. Preparing for death is a draining experience, both emotionally and spiritually. It should be something that a person has to do only once in a lifetime. I have had to do that many times since being on death row during these many years. I've also had to watch my loved ones experience similar pain.

6. Death row is one of the loneliest, most miserable places on the earth. It is not only miserable because you know the state is planning on killing you, but also because you see the state killing other human beings around you. There have been approximately 90 executions in Texas since I've been here. My inmate identification number is 591. The guys that they're bringing to death row now have their inmate identification numbers in the 1100s. A lot of time has passed, almost two decades, since I've been here. I was a young man when I was arrested. Now I'm approaching my middle aged years.

7. There have been countless times that I have been unable to eat or sleep because of the never-ending stress that I have felt during my lengthy time on death row. Depression and anxiety always follows you around. You never seem to be able to escape it here. I regularly have had nightmares. I have them almost every night when I have had an execution date pending.

8. Although one of my attorneys, Brent Newton, typed this affidavit, it reflects what I have said. I have carefully read this over before signing it.

Affiant further sayeth not.

Clarence Lackey
CLARENCE ALLEN LACKEY

SWORN AND SUBSCRIBED BEFORE ME ON THIS 21st DAY OF FEBRUARY, 1995.

S. Taylor
NOTARY PUBLIC
My commission expires on:

S. TAYLOR
NOTARY PUBLIC
STATE OF TEXAS
Commission Expires 6-27-95

**APPENDIX B**

CITY of DIFFERDANGE, GRAND DUCHY of LUXEMBOURG (EUROPE).

## A F F I D A V I T

Comes now the Affiant, Josette TILLING, and states the following :

1. My name is Josette TILLING. I am a citizen of Luxembourg, a country in Europe. I am over the age of 21 and am otherwise competent to make this affidavit.

2. I have known a Texas death row inmate named Clarence LACKEY for over four years. Since January 1991, I have corresponded with him by mail. In the first two years of knowing Clarence, I corresponded with him on a weekly basis; since December of 1992, I have corresponded with Clarence on a nearly daily basis. He has written me letters nearly every other over day for the last two years. I have also flown to the U.S.A. in order to visit personally with Clarence on numerous occasions at the Ellis One Unit in Huntsville, Texas. I have personally visited with Clarence on 18 different occasions at the prison, for approximately 80 total hours. Although we are not related, I feel like Clarence is a close relative. He has opened up his life to me. I love him very much.

3. Since I have known Clarence, he has had four execution dates set by the Texas courts. The first date was in July of 1992. The second date was in October of 1992. The third date was in December of 1992. Each execution date was ultimately stayed by the courts. Clarence's fourth execution date is now pending.

4. In letters and in personal visits, Clarence has told me about what he felt when those execution dates were scheduled and then stayed. I have also observed the effect of the repeated dates on Clarence. The repeated execution dates have caused Clarence severe stress, depression, anxiety, and fear. The experience of the third execution date was the most traumatic for Clarence. He came within seven hours of being executed before that third execution date was stayed by a court. Clarence became very ill — emotionally, mentally, and physically — as a result of that experience. After this latest execution was scheduled in early 1995, Clarence has become extremely depressed and scared of dying. What has really traumatized Clarence is the repeated nature of the execution dates scheduled between 1992-1995. Clarence's pain has also been the result of the fact that he has spent nearly two decades on death row, waiting to die.

Aloyse BIEL ★ Notaire, DIFFERDANGE ★

..... / .....

5. Clarence has limited intellectual abilities. There was evidence at his trial that he suffers from borderline or mild mental retardation. In many ways, he is very much like a little boy. It is my opinion that his stress and anxiety caused by the repeated execution dates and the length of time that he has been on death row have been increased because of Clarence's limited intellectual abilities.

Affiant further sayeth not.

( Josette TILLING )

SWORN AND SUBSCRIBED BEFORE ME ON THIS 14th DAY OF FEBRUARY, 1995.

Aloyse BIEL ★ Notaire, DIFFERDANGE ★

APOSTILLE

(Convention de la Haye du 5 octobre 1961)

1. Pays: Grand-Duché de Luxembourg
Le présent acte public
2. a été signé par Me Aloyse BIEL
3. agissant en qualité de Notaire
4. est revêtu du sceau/timbre de
Attesté
5. à Luxembourg 6. le 14 FEV. 1995
7. par Ministère des Affaires Etrangères
8. sous N° 199 A 95
9. Sceau/timbre: 10. Signature:

Bernard BACH
Préposé
du Service des Passeports, Visas et Légalisations

APPENDIX C

and psychological impact of this experience, for it only reveals that which it is to be expected. These men are not alone in their suffering for there are now 23 prisoners in death row who have been awaiting execution for more than ten years and 82 prisoners who have been awaiting execution for more than five years. It is against this disturbing background that their Lordships must now determine this constitutional appeal and must in particular re-examine the correctness of the majority decision in *Riley v. Attorney-General of Jamaica* [1983] 1 A.C. 719.

The death penalty.

The death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of.

In earlier times execution for murder, as opposed to other capital offences, followed immediately after conviction. In 1752 An Act for better preventing the horrid Crime of Murder (25 Geo. 2, c.37) provided that all persons convicted of murder should be executed on the next day but one after sentence, unless convicted on Friday in which case they were to be executed on Monday and kept in solitary confinement upon bread and water until executed. The extreme rigour of this regime of immediate execution for murder was re-enacted in the Offences against the Person Act 1828 (9 Geo. 4, c.31) but was repealed by the Act of 1836 (6 Will. 4, c.30) "more effectually to preserve from an irrecoverable Punishment any Persons who may hereafter be convicted upon erroneous or perjured Evidence" and it was enacted that henceforth sentence of death in murder cases should be pronounced in the same manner and the judge should have the same powers as after convictions for other capital offences.

In England the practice in capital cases, henceforth including murder, was for the sheriff to fix a date of execution in the fourth week after the death sentence was passed. In Scotland, the date of execution was fixed by the court under section 2 of the Criminal Law (Scotland) Act 1830: if sentence was pronounced south of the Forth, it was fixed between 15 and 21 days hence, and if north of the Forth, between 20 and 27 days hence. In both England and Scotland the Court of Appeal heard an appeal in a capital case within three weeks of verdict. If the appeal was unsuccessful a revised execution date was set not less than 14 or more than 18 days after the day when the appeal was dismissed, in order to allow the Secretary of State time to decide whether the sentence should be commuted. The Report of the Royal Commission on Capital Punishment 1949-53 (Cmd. 8932) gave the average delay in 1950 as six weeks if there was an appeal and three weeks if there was not.

In 1947 there was great public disquiet that men convicted of a murder on the Gold Coast had been under



sentence of death for two years. The matter was debated in Parliament and the Colonial Secretary gave an assurance to the House that the rules and practice to be adopted in the Colonies should be quite sufficient to prevent a repetition of the happenings in the Gold Coast. The concern expressed by members of Parliament in the course of the debate reflected the expectation that the Colonies would follow the long established practice in this country that execution would not be long delayed after sentence. Mr. Winston Churchill expressed the sentiment of the House when he said "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty, however it may be, whatever their crime. That is a wrong thing".

The rules and practice referred to by the Colonial Secretary were those that laid down a strict timetable for appeals to the Judicial Committee of the Privy Council and provided that execution would only be stayed so long as the timetable was adhered to. Such rules were in force in Jamaica before independence and were adopted after independence by the Governor-General in Privy Council on 14th August 1962; it will in due course be necessary to consider why they were not followed in this case.

Delay of the character which has occurred in this case had never happened in Jamaica before independence. Appendix C of the appellants' case contains a schedule showing the time that elapsed between the date of conviction, appeal and execution in 40 capital cases immediately after independence between the years 1962 and 1970. The time is never more than 18 months and usually considerably shorter. The Solicitor-General felt unable to accept the accuracy of this schedule, but no figures were submitted to contradict it, and their Lordships accept it as showing that the delays that are now being encountered in the execution of the death penalty are of fairly recent origin.

It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment. Prior to independence, applying the English common law, judges in Jamaica would have had the like power to stay a long delayed execution, as foreshadowed by Lord Diplock in *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342 when he said at page 1348:-

> "In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law'."

And as was asserted by Lord Templeman in *Bell v. D.P.P.* [1985] A.C. 937 where at page 950 he said:-

"Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay."

The Chronology.

It is now necessary to consider and comment upon the course of events that has resulted in the inordinate delay that has occurred in this case.

The murder was committed on 6th October 1977 and the appellants were sentenced to death on 15th January 1979. Their application for leave to appeal was dismissed by the Court of Appeal on 5th December 1980 who said that they would hand down their reasons later. Although notice of application for leave to appeal was given within three days of the conviction on 18th January 1979, it took almost two years to arrange a hearing by the Court of Appeal. Making every allowance for the pressure of work on the Jamaican courts this does seem a long time to arrange a hearing in a capital case which one would have expected to have been expedited. On their application for leave to appeal the appellants both asked that the Court of Appeal should assign legal aid to them. The appeal was listed for hearing before the appellants had been assigned legal aid and had to be taken out of the list on their application on 28th May 1980 so that they might be legally represented. On the following day, 29th May 1980, a legal aid certificate was issued and counsel were assigned to the appellants. It appears therefore that at least part of the delay in hearing the appeal was attributable to the failure to issue a legal aid certificate at a much earlier date.

On 7th January 1981, a month after their application for leave to appeal was dismissed, the appellants wrote to the Registrar of the Court of Appeal requesting that the necessary papers be made available to their Attorneys-at-law so that whenever they wished they could take the case to the Judicial Committee of the Privy Council. On 30th January the Registrar replied to say she had spoken to their Attorney-at-law, Mr. Eric Frater, who had advised her that he was endeavouring to take their matter to the Privy Council in England.

It was at this stage, after the dismissal of their application by the Court of Appeal, that their Lordships would have expected the Governor-General to refer the case to the Jamaican Privy Council (JPC) to advise him whether or not the men should be executed in accordance with sections 90 and 91 of the Constitution which provide:-

"90.-(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf -



(a) grant to any person convicted of any offence against the law of Jamaica a pardon, either free or subject to lawful conditions;

(b) grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;

(c) substitute a less severe form of punishment for that imposed on any person for such an offence; or

(d) remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

91.(1) Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution.

(2) The power of requiring information conferred on the Governor-General by subsection (1) of this section shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgement the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion."

These sections are included in the Constitution against the background of the pre-existing common law practice that execution followed as swiftly as practical after sentence. They must be construed as imposing a duty on the Governor-General to refer the case to the JPC and the JPC to give their advice as soon as practical. In the ordinary course of events the Governor-General should refer a capital case to the JPC immediately after the appeal is dismissed by the Court of Appeal, unless there exist some special circumstances such as a moratorium upon the execution of all death sentences or a decision is awaited in another case of either the Judicial Committee of the Privy Council or a human rights body that may affect the view of the JPC. The Instructions approved by the Governor-General in Privy Council dated 14th

August 1962 for dealing with applications from or on behalf of prisoners under sentence of death for special leave to appeal to the Judicial Committee of the Privy Council are written upon the premise that the date for execution has already been set and will only be postponed if the prisoner adheres to the strict timetable contained in the Instructions. It is implicit in these Instructions that, by the time the prisoner has taken advice as to whether or not he should petition the Judicial Committee of the Privy Council in England, a decision will already have been taken by the JPC as to whether or not he should be executed or reprieved. There is no indication that the letter written to the Registrar on 7th January 1981 was brought to the notice of the Governor-General, and certainly no intimation in writing was sent to the Governor-General of an intention to apply to the Judicial Committee of the Privy Council as required by the Instructions.

Their Lordships were surprised to learn from the written submissions of the respondents that the procedure set out in the 1962 Instructions is no longer adhered to. The respondents say:-

> "The appellants in keeping with what had now become established practice gave no intimation to the Governor-General of his intention to apply for special leave. That procedure had long fallen into disuse; it was a relic of history; it was obsolete; it was not required by law. The practice was now to apply directly to the Registrar of the Court of Appeal so that papers could be sent directly to the solicitors in London."

Their Lordships can perceive no reason why the appellants' case should not have been referred to the JPC for a decision early in 1981. A reason for a short period of delay after the decision of the Court of Appeal in December 1980 may be found in the political debate on the desirability of retaining the death sentence in Jamaica which resulted in a resolution of the Senate on 9th February 1979 to suspend all executions for a period of eighteen months pending the report of a Committee of inquiry. The Committee of Inquiry was appointed in June 1979. Before the Committee reported, an execution took place on 27th August 1980 which drew a protest to the JPC from the Chairman of the Committee. No further executions took place before the Committee reported in March 1981. On 12th May 1981 executions were resumed. The JPC must have considered and advised on the 12th May execution shortly after the Committee reported in March and it is difficult to see why at about that time they should not have considered and advised upon the appellants' case.

It is true that on 12th June 1981 Pratt petitioned the Inter-American Commission on Human Rights (IACHR) but it would not appear that the Jamaican authorities were aware of this until the IACHR wrote to the Government of Jamaica requesting information about Pratt's case on 17th February 1983. So these proceedings provide no answer to the



question why the JPC did not consider the appellants' case in 1981.

If the case had been considered by the JPC at that time and an execution date had been fixed their Lordships have little doubt that this would have galvanised the appellants and their legal advisers into pursuing their application for leave to appeal to the Judicial Committee of the Privy Council. As it was, no date was set for execution and matters were allowed to drift on; whether this was a deliberate policy adopted by the appellants and their advisers or, as seems more likely, due to the appellants' lack of access to legal advice, cannot be determined with any certainty.

Pratt showed renewed interest in the possibility of an appeal to the Judicial Committee of the Privy Council when he wrote on 23rd March 1984 to an English Member of Parliament to enquire about his right to appeal to the Privy Council and received advice in the form of a letter written by the Registrar to the Judicial Committee of the Privy Council which was forwarded to him on 17th May. Pratt then on 16th August wrote to the Registrar of the Court of Appeal asking for the reasons why his application for leave to appeal was dismissed. It then transpired that no reasons had yet been prepared by the judge to whom the writing of the judgment had been assigned. The papers had apparently been put in the wrong bundle and forgotten. This was a serious oversight by the judge and by those in the office of the Court of Appeal who should have reminded him that reasons had not been provided in accordance with the practice of the Court of Appeal, which is to provide a reserved judgment or reasons within three months of a hearing. Prompted by Pratt's request reasons were quickly prepared and handed down on 24th September 1984. No immediate steps were, however, taken to petition the Judicial Committee of the Privy Council.

On 3rd October the IACHR rejected Pratt's submission that his trial was unfair; but recommended that his sentence be commuted for humanitarian reasons.

Again their Lordships do not understand why the case was not then referred to the JPC to advise whether or not the execution should proceed. However it was not and 1985 appears to have been a year of total inactivity.

On 28th January 1986 Pratt petitioned the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights.

On 13th March 1986 the appellants lodged notice of intention to petition for special leave to appeal to the Judicial Committee of the Privy Council. The application for special leave was heard with reasonable dispatch and special leave to appeal was refused by the Judicial Committee of the Privy Council on 17th July 1986. Rule 5

of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 requires that a petition for special leave should be lodged as soon as possible after judgment. This was certainly not done in this case; but the requirement appears to have been waived without comment.

In dismissing the application Lord Templeman expressed the concern of the Judicial Committee that three years and nine months had elapsed between the dismissal of the appeal and the delivery of the reasons. He said:-

> "On 5th December, 1980 the Court of Appeal dismissed the petitioner's appeal against conviction and the sentence of death for murder and promised to put their reasons for so doing in writing. Those reasons were not delivered until three years and nine months later, namely on 24th September, 1984. During the whole of that period the appellant had sentence of death hanging over him and, of course, no action could be taken on his behalf, or on behalf of the authorities, pending the possibility of an appeal to this Board which could only be considered when those reasons had been delivered."

As Rowe P. pointed out in his judgment in the Court of Appeal this comment was not strictly accurate and undoubtedly misled the two international bodies to whom the appellants petitioned. In practice it is necessary to have the reasons of the Court of Appeal available at the hearing of the application for special leave to appeal, as without them it is not usually possible to identify the point of law or serious miscarriage of justice of which the appellant complains. The availability of the reasons is not, however, a condition precedent to lodging an application for special leave to appeal. Their Lordships have no doubt that if an application for special leave to appeal had been lodged together with a request for the reasons they would have been swiftly delivered as they were when Pratt finally requested them in 1984. Although it is most regrettable that the Court of Appeal overlooked the delivery of its reasons for dismissing the appeal, it is not possible to attribute the delay in lodging the notice of application for leave to appeal to the Judicial Committee of the Privy Council to the lack of reasons.

On 21st July 1986 the UNHRC requested Jamaica not to carry out the death sentence on Pratt and Morgan before it had an opportunity to consider the admissibility of the complaint.

On 18th November 1986 the JPC, apparently for the first time, considered the appellants' case. They did not accede to the request of the UNHRC to stay the execution and the first warrant of execution was issued on 12th February 1987 for execution on 24th February.

On 23rd February the Governor-General issued a stay of execution. The reasons for the stay are not entirely clear but may have been the result of a telegram from the UNHRC



urging a stay of execution and a letter from Mr. Noel Edwards Q.C., to the Governor-General informing him that the case of the appellants was due to be considered by the UNHRC on 23rd March 1987 and the IACHR on 26th March 1987.

The Superintendent of the Saint Catherine District Prison at that time says in his affidavit that he was informed of the stay by telephone at 4.30 p.m. on 23rd February and ten minutes later informed the appellants in the condemned cell and that as soon as he received written confirmation about twenty minutes later the men were removed from the condemned cell and returned to death row. The appellants in their affidavits say that they were not informed of the stay until 45 minutes before they were due to be executed on the morning of 24th February. This is a dispute which their Lordships cannot resolve on the affidavit evidence.

On 9th July 1987 the IACHR pursuant to further representations of Pratt and Morgan informed the Jamaican government of the following findings:-

> "Pratt and Morgan suffered a denial of justice during the period 1980-1984 violative of Article 5(2) of the American Convention on Human Rights. The Commission found that the fact that the Jamaican Court of Appeal issued its decision on December 5 1980 but did not issue the reasons for that decision until four years later, September 24, 1984, was tantamount to cruel, inhuman and degrading treatment because during that four year delay the petitioners could not appeal to the Privy Council and had to suffer four years on death row awaiting execution.
>
> The Inter-American Commission on Human Rights, pursuant to its cable of July 7 1987 requests that the execution of Messrs. Pratt and Morgan be commuted for humanitarian reasons."

This decision, as has already been explained was based on a misunderstanding of the appellants' right to appeal to the Judicial Committee of the Privy Council.

On 13th October 1987 the JPC reconsidered the appellants' case. They did not accede to the request of the IACHR and on their advice the second warrant of execution was issued on 18th February 1988 for execution on 1st March.

On 29th February 1988 the second stay of execution was issued by the Governor-General. This time it appears to have been as a result of a further request from the UNHRC not to execute the men until the Committee had completed their review of the case.

On 24th March the UNHRC decided that the appellants' case was admissible contrary to the submission of the Jamaican government that the appellants had not yet exhausted their domestic remedies and requested Jamaica not to carry out the death sentence until the Committee had arrived at their decision on the merits. Their Lordships observe that it had taken over two years for the Committee to determine that the case was admissible. The ground upon which the Jamaican government had opposed the appellants' submission is stated in paragraph 6(4) of the Committee's decision:-

> "The State party contends that the authors' communications are inadmissible because they have failed to exhaust domestic remedies as required by Article 5(2)(b) of the Optional Protocol. It points out that in respect of the authors' complaints – breach of the right to trial without undue delay and breach of the right to protection against subjection to torture or cruel, inhuman or degrading treatment – it would have been open to the authors to apply to the Supreme Court for redress alleging breaches of these fundamental rights protected by sections 17 and 20(1) of the Jamaican Constitution respectively."

Their Lordships find this a puzzling stance to be taken by the Jamaican government in view of their successful submission in *Riley v. Attorney-General of Jamaica (supra)* that delay in carrying out execution could afford no ground for holding the execution to be in breach of the Jamaican Constitution; unless it is perhaps to be construed as an encouragement to the appellants to challenge the decision in *Riley* and seek relief under the Constitution. This, however, seems to be unlikely in view of the Solicitor-General's formidable argument before their Lordships in support of the majority reasoning in *Riley*. What is certain is that it added to the delay in the Committee dealing with the case on the merits.

On 6th April 1989 the UNHRC gave their decision on the merits. They held that the failure of the Court of Appeal to deliver reasons for 45 months was a violation of Article 14 para. 3(c) and Article 14 para. 5 of the International Covenant on Civil and Political Rights and Optional Protocol which are in the following terms:-

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...
>
> (c) To be tried without undue delay.
>
> ...
>
> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

The Committee gave the following reasons for their decision:-



> "13.4 The State party has contended that the time span of three years and nine months between the dismissal of the authors' appeal and the delivery of the Court of Appeal's written judgement was attributable to an oversight and that the authors should have asserted their right to receive earlier the written judgement. The Committee considers that the responsibility for the delay of 45 months lies with the judicial authorities of Jamaica. This responsibility is neither dependent on a request for production by the accused in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused. The Committee further observes that the Privy Council itself described the delay as inexcusable (see para. 2.3 above).
>
> 13.5 In the absence of a written judgement of the Court of Appeal, the authors were not able to proceed to appeal before the Privy Council, thus entailing a violation of article 14, paragraph 3(c), and article 14, paragraph 5. In reaching this conclusion it matters not that in the event the Privy Council affirmed the conviction of the authors. The Committee notes that in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be."

It seems to their Lordships unlikely that the Committee would have made this finding if they had not been misled into believing that the delay in giving reasons prevented an appeal to the Privy Council.

The Committee also found a violation of Article 7 which provides:-

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The Committee gave their reasons as follows:-

> "13.6 There are two issues concerning article 7 before the Committee: the first is whether the excessive delays in judicial proceedings constituted not only a violation of article 14, but 'cruel, inhuman and degrading treatment'. The possibility that such a delay as occurred in this case could constitute cruel and inhuman treatment was referred to by the Privy Council. In principle prolonged judicial proceedings do no *per se* constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.

In the present cases the Committee does not find that the authors have sufficiently substantiated their claim that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7.

13.7 The second issue under article 7 concerns the issue of warrants for execution and the notification of the stay of execution. The issue of a warrant for execution necessarily causes intense anguish to the individual concerned. In the authors case, death warrants were issued twice by the Governor-General, first on 13 February 1987 and again on 23 February 1988. It is uncontested that the decision to grant a first stay of execution, taken at noon on 23 February 1987, was not notified to the authors until 45 minutes before the scheduled time of the execution on 24 February 1987. The Committee considers that a delay of close to 10 hours from the time the stay of execution was granted to the time the authors were removed from their death cell constitutes cruel and inhuman treatment within the meaning of article 7."

The Committee did not know that this allegation was strenuously denied by the Jamaican government. The Solicitor-General has told their Lordships that the Jamaican government did not know that this allegation had been made to the Committee on behalf of Pratt and Morgan and that if the government had known of it they would have put in affidavit evidence denying it. If that had been done their Lordships surmise that the Committee, like their Lordships, might have found it difficult to resolve the conflict of evidence and thus to find a violation of Article 7 on the ground of delay of notification in the stay of execution.

The Committee made the following recommendation:-

"It is the view of the Committee that, in capital punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant. Although in this case article 6 is not directly at issue, in that capital punishment is not *per se* unlawful under the Covenant, it should not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant. The Committee is of the view that the victims of the violations of articles 14, paragraph 3(c), and 7 are entitled to a remedy; the necessary prerequisite in the particular circumstances is the commutation of the sentence."

Eighteen months then passed before a decision was taken by the JPC on this recommendation of the UNHRC. Press reports of Parliamentary proceedings show that in June 1990 the question of the death penalty was under review by the Cabinet but that no conclusions had yet been reached on commuting sentences.



On 17th September 1990 the JPC again reconsidered the appellants' case. They rejected the recommendations made eighteen months earlier by the UNHRC. On 18th February 1991 the warrant of execution was issued for execution on 7th March 1991, the delay in issuing the warrant of execution from 17th September 1990 to 18th February 1991 apparently being accounted for by the wish of the Governor-General to obtain the Attorney-General's advice on the legal status of decisions of human rights bodies. This is advice which it would have been appropriate to place before the members of the JPC at a much earlier date, and before they considered any recommendations of such bodies. Their Lordships have not seen the Attorney-General's advice but do not doubt that it correctly advised that, Jamaica being a signatory to the International Covenant on Civil and Political Rights and to the Optional Protocol, the views of the UNHRC should be afforded weight and respect but were not of legally binding effect; and that the like considerations applied to the IACHR.

On 28th February 1991 the appellants commenced these proceedings pursuant to section 25 of the Constitution and as a result the execution set for 7th March was stayed. On 14th June the Supreme Court dismissed their application.

On 8th June 1992 the Court of Appeal dismissed their appeal and on 18th January 1993 gave leave to appeal to the Judicial Committee of the Privy Council.

The primary submission of the appellants is that to hang them after they have been held in prison under sentence of death for so many years would be inhuman punishment or other treatment and thus in breach of section 17(1) of the Constitution.

Section 17 of the Constitution provides:-

"17.-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

This submission cannot succeed unless their Lordships are persuaded to prefer the construction of section 17(2) adopted by the minority in *Riley v. A.G. of Jamaica* to that of the majority. The five appellants in *Riley* had been sentenced to death and held in custody for between six and seven years before their appeal was heard by the Privy Council. They submitted that to execute them after such a prolonged delay would contravene their rights

under section 17(1) of the Constitution. By a majority the Privy Council rejected this submission because they construed section 17(2) as authorising execution by hanging for murder no matter how long the delay between the passing of the sentence and the execution. Lord Bridge of Harwich said at page 726:-

"The question, therefore, is whether the delayed execution of a sentence of death by hanging, assuming it could otherwise be described as 'inhuman or degrading punishment or other treatment' - a question on which their Lordships need express no opinion - can escape the unambiguous prohibition imposed by the words in section 17(2) emphasised as follows:

> 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.'

An act will fall within this prohibition if it satisfies three related conditions, viz.: (a) it must be an act done under the authority of law; (b) it must be an act involving the infliction of punishment of a description authorised by the law in question, being a description of punishment which was lawful in Jamaica immediately before the appointed day; (c) it must not exceed in extent the description of punishment so authorised.

There can be no doubt whatever that a delayed execution would satisfy conditions (a) and (b). The only words in section 17(2) that are even arguably ambiguous are the words 'to the extent that'. It seems to their Lordships that in their context these words pose the question: to what extent did the law in Jamaica before independence authorise the description of punishment which is under challenge? This question can only be answered by asking in turn the further question: if the like description of punishment had been inflicted in the like circumstances before independence, would this have been authorised by law? An obvious instance of a description of punishment exceeding in extent that authorised by law would be the execution of a death sentence by burning at the stake. But since the legality of a delayed execution by hanging of a sentence of death lawfully imposed under section 3(1) of the Offences against the Person Act could never have been questioned before independence, their Lordships entertain no doubt that it satisfies condition (c). Accordingly, whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1)."



This construction of section 17(2) focuses on the act of punishment, and proceeds upon the assumption that the legality of a long delayed execution could never have been questioned before independence. Their Lordships, having had the benefit of much fuller argument, cannot accept that there could have been no challenge to a long delayed execution before independence and for the reasons already given are satisfied that such an execution could have been stayed as an abuse of process. The due process of law does not end with pronouncement of sentence - see *Abbott v. Attorney-General of Trinidad and Tobago* [1979] 1 W.L.R. 1342.

The minority, who would have allowed the appeal, adopted a narrower construction of section 17(2) which limited the scope of the sub-section to authorising the passing of a judicial sentence of a description of punishment lawful in Jamaica before independence and they held it was not concerned with the act of the executive in carrying out the punishment.

Their Lordships are satisfied that the construction of section 17(2) adopted by the minority is to be preferred. The purpose of section 17(2) is to preserve all descriptions of punishment lawful immediately before independence and to prevent them from being attacked under section 17(1) as inhuman or degrading forms of punishment or treatment. Thus, as hanging was the description of punishment for murder provided by Jamaican law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder.

Section 17(2) does not address the question of delay and is not dealing with the problem that arises from delay in carrying out the sentence. The primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedoms, not to curtail them. Before independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay, and their Lordships are unwilling to adopt a construction of the Constitution that results in depriving Jamaican citizens of that protection.

The majority also relied upon the judgment of the Board in *de Freitas v. Benny* [1976] A.C. 239. In that case which concerned the construction of the Constitution of Trinidad and Tobago the time scale was wholly different from the present case. The appellant had been sentenced to death in August 1972 and his constitutional appeal was heard and determined by the Privy Council in May 1975. Their Lordships in *de Freitas v. Benny* said that they had difficulty in formulating the appellants' argument based on delay: but it appears to have been founded upon a submission that as the time between sentence and execution was before independence on average five months, an execution that involved a delay longer than this was open to attack as cruel and unusual punishment.

Their Lordships dismissed this argument without calling on the respondents. Both the argument and the extent of the delay are so different from the present appeal that their Lordships are unable to gain any assistance from this decision.

Their Lordships will therefore depart from *Riley* and hold that section 17(2) is confined to authorising descriptions of punishment for which the court may pass sentence and does not prevent the appellant from arguing that the circumstances in which the executive intend to carry out a sentence are in breach of section 17(1).

The Court of Appeal rightly held that they were bound by the majority decision in *Riley* and did not therefore consider whether the appellants had been subjected to inhuman or degrading punishment or treatment within the meaning of section 17(1). It is however to this question which is central to this appeal that their Lordships must now turn.

There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time. But before their Lordships condemn the act of execution as "inhuman or degrading punishment or other treatment" within the meaning of section 17(1) there are a number of factors that have to be balanced in weighing the delay. If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the accused cannot be allowed to take advantage of that delay for to do so would be to permit the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime.

A much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account.

There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between sentence and execution. This is the view that currently prevails in some States in the United States of America and has resulted in what has become known as the death row phenomenon where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures. Powerful statements in support of this point of view appear in the opinion of Circuit Judge O'Scannlain in *Richmond v. Lewis* (1990) 948 F. 2d. 1473, a decision of the United States Court of Appeals for the Ninth Circuit, and in the judgment of La Forest J. in *Kindler v. Canada (Minister of Justice)*



(1991) 67 C.C.C. (3d) 1, a decision of the Supreme Court of Canada. A further valuable analysis of the decisions in the United States Courts appears in the judgment of the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney General and Others* (Judgment No. S.C. 73/93, unreported, delivered on 24th June 1993).

Support for this view is also to be found in previous decisions of the Privy Council. In *Abbott v. A.G. of Trinidad and Tobago* [1979] 1 W.L.R. 1342 an unsuccessful appeal against the death sentence was made upon the ground that the period of eight months taken to reject the petition for reprieve infringed the appellant's constitutional rights. The appeal was heard by the Privy Council on 4th April 1979 nearly six years after the conviction on 16th July 1973. In delivering the judgment of the Board, Lord Diplock said at page 1345:-

> "That so long a total period should have been allowed to elapse between the passing of a death sentence and its being carried out is, in their Lordships' view, greatly to be deplored. It brings the administration of criminal justice into disrepute among law-abiding citizens. Nevertheless their Lordships doubt whether it is realistic to suggest that from the point of view of the condemned man himself he would wish to expedite the final decision as to whether he was to die or not if he thought that there was a serious risk that the decision would be unfavourable. While there's life, there's hope. At any rate, as in *de Freitas v. Benny* [1976] A.C. 239, it has to be conceded that the applicant cannot complain about the delay totalling three years preceding his petition for pardon caused by his own action in appealing against his conviction or about the delay totalling two years subsequent to the rejection of his petition caused by his own action in appealing against the sentence on constitutional grounds. His case as advanced before their Lordships has depended solely on the period of somewhat less than eight months sandwiched between the two longer periods, which was allowed by the state to elapse between the lodging of his petition for pardon and its rejection by the President. This it is claimed amounted to delay so inordinate as to involve a contravention of his constitutional rights."

In *Riley* Lord Bridge of Harwich said at page 724:-

> "Apart from the delays necessarily occasioned by the appellate procedures pursued by the applicant (of which it could hardly lie in any applicant's mouth to complain)."

Lord Scarman and Lord Brightman concluded their dissenting judgment by saying at page 736:-

> "Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is, of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading."

However, in an earlier passage of their judgment at page 735 Lord Scarman and Lord Brightman said:-

> "It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading."

Their Lordships are therefore doubtful whether Lord Scarman and Lord Brightman would have regarded delay caused by appeals made within the time scale permitted by the State as time to be left out of account in computing the total period of delay.

There are other authorities which do not accept that delay occasioned by use of appeal procedures is to be disregarded. In *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General (supra)* Gubbay C.J. said:-

> "It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available the condemned prisoner would have shortened and not lengthened his suffering. The situation could be otherwise if he had resorted to a series of untenable and vexatious proceedings which, in consequence, had the effect of delaying the ends of justice."

And he expressed his dissent from the contrary view contained in *Abbott v. A.G. of Trinidad and Tobago and Others*.

In *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439 the applicant, a West German national, alleged that the decision by the Secretary of State for the Home Department to extradite him to the United States of America to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Cmd. 8969) which provides that no one should be subjected to torture or to inhuman or degrading treatment or punishment.



The United States had applied to the United Kingdom to extradite the applicant to stand trial in the State of Virginia on a charge of capital murder. The European Court of Human Rights recognised that the death row phenomenon in Virginia where prisoners were held for a period of six to eight years before execution arose from repeated applications by the prisoner for a stay of execution but nevertheless held that such a long period of delay might go beyond the threshold set by Article 3.

In India, where the death penalty is not mandatory, the appellate court takes into account delay when deciding whether the death sentence should be imposed. In *Vatheeswaran v. State of Tamil Nadu* [1983] 2 S.C.R. 348 Chinnappa Reddy J. said at page 353:-

> "While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay."

The court held that delay exceeding two years in the execution of a sentence of death should be sufficient to entitle a person under sentence of death to demand the quashing of his sentence on the ground that it offended against Article 21 of the Indian Constitution which provides "No person shall be deprived of his life or personal liberty except according to procedure established by law".

In *Sher Singh and Others v. The State of Punjab* [1983] 2 S.C.R. 582 the court held:-

> "Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard and fast rule that 'delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death' can be laid down as has been in *Vatheeswaran*."

The court pointed out that to impose a strict time limit of two years would enable a prisoner to defeat the ends of justice by pursuing a series of frivolous and untenable proceedings.

In *Smt. Treveniben v. State of Gujarat* (1989) 1 S.C.J. 383 the Supreme Court of India approved the judgment in *Sher Singh v. The State of Punjab* and held

that a sentence of death imposed by the "Apex Court", which will itself have taken into account delay when imposing the death sentence, can only be set aside thereafter upon petition to the Supreme Court upon grounds of delay occurring after that date. Oza J. said, at page 410:-

> "If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether, it is just and fair to allow the sentence of death to be executed."

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

The application of the appellants to appeal to the Judicial Committee of the Privy Council and their petitions to the two human rights bodies do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay in this case. The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of Article 3 of the European Convention and their Lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.

In arriving at this conclusion their Lordships do not overlook the reliance placed by the Solicitor-General on the dissenting judgment of Sir Gerald Fitzmaurice in *The Republic of Ireland v. The United Kingdom* (1978) 2 E.H.R.R. 25, 120 but prefer an interpretation of the Constitution of Jamaica that accepts civilised standards of behaviour which will outlaw acts of inhumanity, albeit they fall short of the barbarity of genocide.



Section 25(2) of the Constitution provides that:-

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled."

The width of the language of this subsection enables the court to substitute for the sentence of death such order as it considers appropriate. The appropriate order in the present case is that the sentence of death of each appellant should be commuted to life imprisonment.

Their Lordships are very conscious that many other prisoners under sentence of death are awaiting the outcome of this appeal. In an attempt to assist the Jamaican authorities who may be faced with a large number of appeals their Lordships wish to make some general observations.

The delay in this case would never have reached anything like its present dimensions if the Governor-General and the JPC had reviewed the case pursuant to sections 90 and 91 of the Constitution early in 1981 after the Court of Appeal had dismissed the appellants' application for leave to appeal. As has already been pointed out, there was no reason why the case should not have been reviewed at that time and it appears inevitable in the light of after events that the JPC would have advised that the execution should proceed and a date would have been set. This would have provided the impetus for an immediate application to the Judicial Committee of the Privy Council which would have been disposed of in the summer of 1981 and a new execution date set within a matter of weeks. If this had occurred, the grounds upon which the two human rights bodies recommended commutation of sentence to life imprisonment would never have arisen, because the Court of Appeal would have been prompted to deliver their reasons by the application to the Judicial Committee of the Privy Council and the execution would have taken place years before the late reprieve of which the appellants have complained.

There may of course be circumstances which will lead the JPC to recommend a respite in the carrying out of a death sentence, such as a political moratorium on the death sentence, or a petition on behalf of the appellants to IACHR or UNHRC or a constitutional appeal to the Supreme Court. But if these respites cumulatively result in delay running into several years an execution will be likely to infringe section 17(1) and call for commutation of the death sentence to life imprisonment.

Their Lordships are very conscious that the Jamaican government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within twelve months of conviction. The procedure contained in the Governor-General's Instructions should be reinstated so that the JPC consider the case shortly after the Court of Appeal hearing and if an execution date is set and there is to be an application to the Judicial Committee of the Privy Council it must be made as soon as possible, as both the rules of the Judicial Committee of the Privy Council and the Governor-General's Instructions require, in which case it should be possible to dispose of it within six months of the Court of Appeal hearing or within a further six months if there is to be a full hearing of the appeal. In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment.

The final question concerns applications by prisoners to IACHR and UNHRC. Their Lordships wish to say nothing to discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations. It is reasonable to allow some period of delay for the decisions of these bodies in individual cases but it should not be very prolonged. The UNHRC does not accept the complaint unless the author "has exhausted all available domestic remedies". The UNHRC has decided in this case and in *Carlton-Reid* that a constitutional motion to the Supreme Court of Jamaica is not a remedy to which the complainant need resort before making an application to the Committee under the Optional Protocol. A complainant will therefore be able to lodge a complaint immediately after his case has been disposed of by the Judicial Committee of the Privy Council. If, however, Jamaica is able to revise its domestic procedures so that they are carried out with reasonable expedition no grounds will exist to make a complaint based upon delay. And it is to be remembered that the UNHRC does not consider its role to be that of a further appellate court:-

> "The Committee observes that it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before domestic courts and to review the interpretation of domestic law by national courts. Similarly, it is for the appellate courts and not for the Committee to review specific instructions to the jury by the judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his obligation of impartiality."



It therefore appears to their Lordships that provided there is in future no unacceptable delay in the domestic proceedings complaints to the UNHRC from Jamaica should be infrequent and when they do occur it should be possible for the Committee to dispose of them with reasonable dispatch and at most within eighteen months.

These considerations lead their Lordships to the conclusion that in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment". If, therefore, rather than waiting for all those prisoners who have been in death row under sentence of death for five years or more to commence proceedings pursuant to section 25 of the Constitution, the Governor-General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly and without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to section 17(1).

The appellants pursued alternative grounds of appeal upon which their Lordships find it unnecessary to express any conclusions.

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be allowed, and the sentences of the appellants be commuted to life imprisonment.

No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**October Term, 1994**

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**CLARENCE LACKEY**

**Petitioner,**

**v.**

**STATE OF TEXAS**

**Respondent.**

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**MOTION TO PROCEED *IN FORMA PAUPERIS***

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Petitioner Clarence Lackey, an indigent, respectfully moves this Court for leave to file the attached Petition for Writ of Certiorari without costs and to proceed *in forma pauperis* in this Court. An affidavit of indigency is attached hereto.

Respectfully submitted,

Robert C. Owen by express permission
Brent E. Newton


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* Counsel of Record


**AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

I, CLARENCE LACKEY being first duly sworn, depose and say that I am the Petitioner in the above- entitled case; that in support of my motion to proceed without being required to repay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No X

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. 1977 $480/month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources? Yes___ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes___ No X
   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X

   a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are depending upon you for support and state your relationship to those persons. NONE

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Clarence Lackey

Subscribed and sworn to before me this 22 day of Sept. 19 94.

Greg Wiericoch
Notary

My commission expires 5-5-98

Greg Wiericoch NOTARY PUBLIC STATE OF TEXAS EXPIRES 5-5-98